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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 550

ROBERT E. FUNKHOUSER, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROBERT E. FUNKHOUSER,
Petitioner,
5315 Colorado Avenue, N. W.,
Washington 11, D. C.

December 1, 1958.

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v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Robert E. Funkhouser, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the above entitled case decided on October 13, 1958.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is printed as Appendix A, *infra.*

The opinion of the United States District Court for for the District of Maryland is printed as Appendix C, *infra.*

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit (Appendix A, *infra*) was entered on on October 13, 1958.

Rehearing was denied on November 3, 1958 (Appendix B, *infra*).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

1. The main question in this case is; can a citizen of the United States be legally prosecuted, fined and imprisoned for income tax evasion before his income tax returns are inquired about, examined or audited to determine if there is any deficiency in tax due and owing. There was no examination of the returns filed; and no deficiency in tax was determined by the Commissioner and no tax was found due and owing as provided by the Internal Revenue Code of 1939.

The indictment charged that petitioner, Robert E. Funkhouser, by filing false and fraudulent income tax returns for each of the years 1943-1947 had evaded certain specified sums of income taxes due and owing to the United States.

At the trial Respondent testified that he found that Petitioner had reported all of his gross income and all expenses in the returns filed.

The gross income was accepted as filed; but the expenses, all listed in minute detail, and comprising over 30,000 individual items, were questioned to the extent of 200 items which were claimed to be not allowable

as deductions from gross income. They were charged as false and fraudulent.

Respondent then testified that he had not made any examination of the returns to determine the correct amount of the tax as required by Section 57 of the Internal Revenue Code of 1939. The prosecuting agent testified that he charged the items were false and fraudulent because he had disallowed them.

Petitioner claims that on those facts Respondent should have examined the returns as provided by the Code and should not have made these criminal Charges.

2. The record on appeal shows that Petitioner had reported all expenses claimed in greatest detail, in the returns filed. That of the 30,000 individual items reported 29,800 were found to be allowable without question. Over 99 34/100 per cent of the items were accepted without question. Only 200 or 66/100 of one per cent of the listed items were questioned and those were charged as false and fraudulent without the agent having made any examination of the returns or having determined the correct amount of the tax, or determining that a deficiency in tax did exist, or affording any opportunity to protest or appeal, or permitting any petition to the Tax Court for a redetermination of the tax charged as due, owing and evaded by the agent, without his having made any inquiry about the items, any tabulation of the items, any calculation of the items, any computation of the allowable depreciation on the property, any list of the items, or any attempt to analyze the items.

3. The Internal Revenue Code of 1939 sets up a definite and exact requirement for the determination of

the correct amount of the tax and when income tax returns have been filed which report all gross income and all expenses the statutory requirements of the code for the examination of those returns and the determination of the correct tax must be followed before there can be a prosecution and application of the penalties of Section 145(b) of the Code.

4. The decision of the District Court that a taxpayer can be convicted of income tax evasion by a jury's "bird's eye view of the situation" before there has been any examination of the returns to determine the correct amount of the tax; or any tabulation of the items listed on the returns, or any inquiry about the items was error, and resulted in an illegal sentence.

5. The record shows that when the returns complied with the requirements of the code that they should have been examined and the correct amount of the tax should have been determined before a criminal Court jury should have been told they "would be at liberty to find a verdict against him on one or more of the counts involved". It was error to set up any charges and counts before there was an examination of the returns.

6. It was error for the District Court to refuse to allow the Petitioner to present evidence that a proper examination of the returns disclosed that no tax was due, owing, or evaded, when the prosecution testified that no examination, audit, tabulation, calculation or inquiry had been made to determine the correct tax.

7. The Court below erred in its decision of October 13, 1958 when it said:

a. "The statute itself 'imposes the tax' ".

b. "There is no requirement for the precise computation and assessment of the tax before there can be a criminal prosecution for fraudulent tax evasion under Sec. 145(b)."

c. "The Appellant also argues that the Commissioner had not, prior to the prosecution, passed upon each of 30,000 claimed deductions. At the trial the Government did prove that, by making various false claims for deductions, a substantial understatement of taxable income in defendant's returns had occurred".

d. "The sentence imposed here is not illegal in the sense that it is in excess of the punishment authorized by Section 145(b)."

8. The application of the penalties of Section 145(b) without first having made any examination of the returns or the determination of the correct tax, or making any inquiry, audit, tabulation, calculation, computation, list, or any attempt to analyze the items charged as false or fraudulent was illegal.

STATEMENT OF THE CASE

I.

Petitioner was indicted under Section 145(b) of the Internal Revenue Code of 1939 on a charge of having evaded certain income taxes for the years 1943 through 1947. (Record on appeal)

The indictment and trial was had in the District Court for the District of Maryland before there was any examination of the returns filed by Petitioner to

determine the correct amount of the tax. (See Decision of Court below of October 13, 1958, Appendix A, *infra*).

Respondent made no examination of the returns and did not determine the correct amount of the tax. The Court below said:

> "There is no requirement for the precise computation and assessment of the tax before there can be a criminal prosecution for fraudulent tax evasion under Section 145(b). (See decision of Court below Appendix A, *infra*).

This entire proceeding was based on an "assumption" by an agent of Respondent, that perhaps, some time in the future, an examination of the returns might be made; which future examination might disclose that some of the listed items of expense set out in the returns might not be ruled legally allowable as deductions from gross income; and that a deficiency in tax as defined by Section 271 of the Code might be then determined. That agent's "assumed" deficiency is charged in the indictment as tax, due, owing and evaded.

Respondent's agent testified that his examination into the returns consisted of securing the automobile license number of Petitioner's automobile and following that automobile about the roads for a "couple of weeks" (342)[1] until he waylaid the automobile near Petitioner's safety deposit box (342), that he inventoried the safe deposit box (345), and that thereafter he made no inquiry about the par-

[1] ( ) All references are to page number of the Transcript of Proceedings before the District Court for the District of Maryland unless otherwise specified.

ticular items listed as expenses on the returns (44), made no inquiry about the specific checks listed as expenses on the returns (382) made no tabulation of the items of expense listed on the returns (24), made no calculation of the items of expense listed on the returns (25), Made no computation for allowance of any depreciation on depreciable property listed on the returns (172, 416), and other Government witnesses testified that no list of the items of expense were ever made up (See record on appeal, page 84. Ex. page 61a), and "And realizing the enormity of attempting to analyze some 20 or 30 thousand individual items I told them that we would adopt the theory of the Cohan rule and split it down the middle" (See record on appeal, page 84, Ex. Page 56a).

The above quoted testimony of Respondent shows that he made no examination, inquiry, tabulation, calculation, computation, list or any attempt to analyze the items listed on the returns as a basis for any testimony or charges of fraud in this case. Respondent's witnesses testified they *failed* to do everything necessary to prove fraud charges.

The record on appeal shows that Respondent's agents testified that they had made no investigation or examination which would qualify them to charge that any tax was due or evaded on the returns filed by Petitioner.

II.

The record on appeal shows that Respondent testified that he had found that Petitioner had filed income tax returns in which Petitioner had reported all gross income (355), and the District Court so found:

> BY THE COURT: In this case the Government does not charge fraud on the part of the taxpayer in the failure to report gross income but only alleges fraud in making deductions from gross income". (Charge to the jury. Record on appeal page 41).

Now, since the record on appeal shows that all gross income was reported and there was no examination of the returns by the agents to secure any information about the items reported; let us examine the record to see exactly what kind of returns were filed by Petitioner.

The record on appeal shows that the books, records and returns showed a listing of 30,000 individual items of expense listed in the most minute detail. Respondent's description of the books and records and returns is set out in brief on pages 148, 149, 150, 152, 153 of the Record on appeal. And it is set out in elaborate detail in respondent's testimony on pages 10, 19, 20, 21, 30, 32, 33, 34, 140, 141, 142, 143, 175, 177, 178, 206, 207, 262, 263, 264, of the Transcript of Proceedings before the District Court.

The testimony of Respondent's agents cited above shows that the returns were concise, clear, detailed and clearly listed every one of the 30,000 individual expense items.

The record on appeal shows that Respondent accepted 29,800 of the listed items of expense as allowable, without examination—99 34/100 per cent of the listed items were allowed by respondent. 66/100 of one per cent of the items were questioned by Respondent. And that 66/100 of one per cent was questioned and charged as fraudulent without Respondent

having made any examination, inquiry, tabulation, calculation, computation, list or any "attempt to analyze the items". Nothing on which to base any charge of fraud or any tax.

III.

In the Decision of October 13, 1958 the Court below said:

> "The Appellant's main contention was that he could not lawfully be prosecuted for income tax evasion because, he alleges, before indictment his return was not audited to determine the exact amount of tax due by him". (Appendix A)

Petitioner's contention is also that in addition to no examination or audit; that Respondent made no effort to secure any information on which to base any charges of fraud or income tax evasion. (24, 25, 44, 84; Ex. pages 56a, 61a, 172, 416, 382)

Respondent did not comply with the requirements of the Internal Revenue Code of 1939 which is as follows:

> SECTION: 57:—As soon as practicable after the return is filed the Commissioner shall examine it and shall determine the correct amount of the tax.

There is no other provision in the Internal Revenue Code of 1939 for the determination of the correct amount of the tax. No one else has any authority to determine the correct amount of the tax.

The examination of the returns by the Commissioner, as provided in Section 57 provides the only legal way to determine the correct amount of the tax and to determine if a deficiency, as defined by Section 271 of the Code, existed.

Until the return was examined as provided by Section 57 and a deficiency, as defined by Section 271 was determined; there was no deficiency and no tax due and owing as charged in the indictment.

IV.

The confusion of the District Court is shown by the following charge to the jury:

> By the Court: Then this case is a very unusual one in the sense that it has two hundred separate transactions and it is probably beyond the possibility that even the most competent juror should bear in mind all the details of evidence. Therefore, of course, you probably wish to look at the case as a whole, get the perspective of it, what we call a bird's eye view of the situation. If you look at it in that way it does not become too difficult, but of course, it is for the jury to say what its decision will be. As I say, there are these two hundred items, and many of them are not deductible, as a matter of law. But the question, however, is whether the defendant is guilty of wilfully attempting to defeat the tax, which is perhaps a separate question. In other words, it is quite possible, and no doubt, it has happened, that somebody who takes a deduction on an income tax return which he had no right to take under the law, may have thought honestly that he had a right to take it. (Record on appeal, page 52).

The District Court was addressing a jury of seven women and five men who had no opportunity to become competent jurrors in income tax law. The record shows that not a single Internal Revenue law, rule or regulation was quoted or referred to. The record shows that the only law mentioned during the

entire trial was the last 63 words of Section 145(b) which the Judge read to the jury (Charge, Record on appeal, page 35).

Section 57, the only section of the Internal Revenue Code of 1939 which provides who shall determine the correct amount of the tax, and exactly how he shall determine it; was never mentioned to the jury. (See record on appeal).

The record on appeal shows Sections 271 and 272 which define a "deficiency" and provide for the determination of the deficiency and the assessment of any tax to be assessed under the Code were never mentioned; and the testimony of Respondent's agents shows that they had either never heard of Sections 271 and 272 or that they did not understand them, or act in compliance with them.

The agent charged in the indictment that the following sums were due and owing to the United States of America:

1943	$4,294.09	Record on appeal, page 4.
1944	5,452.20	Record on appeal, page 5.
1945	5,693.30	Record on appeal, page 6.
1946	8,195.09	Record on appeal, page 7.
1947	5,430.39	Record on appeal, page 8.

Under the Internal Revenue Code of 1939 that charge was simply not true.

V.

The record shows that the returns had been filed under Section 54. That the records, books and returns required under regulation 29.54-1 had been kept:

> "Every person subject to the tax, shall, for the purpose of enabling the Commissioner to deter-

> mine the correct amount of income subject to the tax, keep such permanent books of account or records, including inventories, as are sufficient to establish the gross income and the deductions, credits, and other matters required to be shown in any return under chapter 1." (Sec. 29.54-1.)

The record shows that Petitioner did keep such records and Respondent did receive 30,000 such items which Respondent did not examine or audit for the purpose of determining the correct amount of the tax. (Sec. 57)

The record shows that Respondent told the Court that 29,800 of the listed items were allowable and the agent questioned 200 of the items. 66/100 of one per cent of the items without making any audit, tabulation, inquiry, calculation, computation, list or any attempt to analyze the items. (Reference to the agent's testimony cited above).

The record shows that the District Court said:

> BY THE COURT: "As to many of the items that he has deducted, they were deductible legally, properly if the facts which the defendant relates to you are accepted by you as true." (Record on Appeal, page 53).

That statement by the Court was in regard to the 66/100 of one per cent of the items questioned by the agent without any inquiry, audit, examination, tabulation, calculation, etc., etc. 29,800 of the items were found allowable without question, inquiry, audit, examination, etc., etc.

The District Court said:

> BY THE COURT: "There are many items here in the two hundred items which were deductible only if

> the evidence of the defendant and his explanation about them is accepted by you. But if you do not accept his testimony with regard to them you would be at liberty to find a verdict of guilty against him on one or more of the counts involved". (Record on Appeal, page 54).

That charge meant to the jury that although 29,800 of the 30,000 items were unquestionably legally allowable — 99 34/100 per cent — that if the jury did not accept the defendant's explanation of any of the other 66/100 of one per cent of the items here questioned without any inquiry, tabulation, calculation, attempt to analyze, list, audit or examine as required by Section 57; then the jury would be at liberty to find a verdict of guilty on one or more of the counts in the indictment. And the record on appeal shows that the indictment was known to be inaccurate and based on several sets of "assumed" figures. (Transcript of proceedings before Hon. W. Calvin Chesnut on May 27, 1952, pages 494-498).

And none of the figures in the indictment or testimony of the agents was based on any examination of the returns as required by the Internal Revenue Code. The whole prosecution was based on the "assumptions" of the agent who testified that he investigated from his automobile (343) and the safety deposit box (345).

And the record shows that although the jury was told by the judge:

> By the Court: "But if you do not accept his testimony with regard to them you would be at liberty to find a verdict against him on one or more of the counts involved". (Record on Appeal, page 54).

VI.

The Judge had refused to allow petitioner to present proof, facts and testimony by an expert accountant who had examined the books, records and returns (see Transcript of proceedings of June 3, 1952, pages 1366-1372, and Transcript of proceedings of June 4, 1952, pages 26-34). That examination showed no tax due (Transcript of June 4, 1952, pages 29-30).

The record on appeal shows that instead of proof of an examination, audit, and the determination of the correct tax; that the Respondent presented "assumptions" (493-497), false charges (indictment figures), perjury about the sale of the laundry (5 and 339), perjury about petitioner's contentions as to the use of some property (104 and 395-397), perjury about the deductibility of medical expenses in 1943 (498), the woods, number of feet of water front, and the depth of the water at the shore of some of Petitioner's property (99). Such proof was offered by Respondent in place of proof of an examination and determination of the correct amount of taxes due (Section 57).

VII.

The District Court was confused, and the Court below was confused:

> By the Court Below in the Decision of October 13, 1958, said: "The statute itself 'imposes' the tax".

Statute 57 provides for the determination of the correct amount of the tax and until there was a determination of the correct amount of the tax by the Commissioner (Section 57) and the determination of

a "deficiency" as defined by Section 271, and a final redetermination of that deficiency by the Tax Court as provided in Section 272, there can be no charge that any tax was due, owing and evaded as set out in the indictment in this case.

Both Courts are confused as to the provisions of the Internal Revenue Code of 1939 and their confusion has resulted in the illegal sentence complained of.

According to the Internal Revenue Code of 1939, Section 29.271-1:

> DEFICIENCY DEFINED.—Section 271 by its definition of the word "deficiency" provides a term which will apply to any amount of tax determined to be due in respect of a taxable year in excess of the amount of tax reported by the taxpayer for such year; or in excess of the amount reported by the taxpayer as adjusted by way of prior assessments, abatements, credits, refunds, or collections without assessment. In defining the term "deficiency" section 271 recognizes two classes of cases—one, where the taxpayer makes a return showing some tax liability; the other, where the taxpayer makes a return showing no tax liability, or where the taxpayer fails to make a return.
>
> When a case is considered for the first time, the deficiency is the excess of the amount determined to be the correct amount of the tax over the amount shown as the tax by the taxpayer on his return, or, if it is a case where no tax was reported by the taxpayer, the deficiency is the amount determined to be the correct amount of the tax.

And the law is again stated in a clear way by the Treasury Department Bulletin printed by the Commissioner for the guidance of taxpayers.

"When you file your income tax return on Form 1040, you have made your own determination of the income subject to tax and hence of the amount of tax you owe the Government. But your tax liability is not officially determined until your return has been examined.

The examination may disclose that you have overpaid your tax and are entitled to a refund. On the other hand, it may disclose that you apparently owe more tax, and this chapter tells you of your rights in such a case, outlining the procedures for protest and appeal which are open to you."

(TREASURY BULLETIN — YOUR FEDERAL INCOME TAX. Page 103.)

Under the applicable Internal Revenue Code of 1939 when my income tax returns had been filed reporting all gross income and all expenses (see Record on Appeal, pages 147-153, quoting Respondent's agents testimony that this had been done), I had complied with all the requirements of the Code and it was then the duty of the Commissioner to examine the returns and determine the correct tax, and I had a legal right to protest, and appeal, as set out above. (Sec. 271, 272). Appellee had no legal right to refuse to examine the returns; and to charge fraud without having made any examination.

There is no provision in the Code for a charge of income tax evasion before the return has been examined and a deficiency has been determined.

This prosecution under Section 145(b) was illegal before any tax was determined and imposed.

The Court below said in the Decision of October 13, 1958:

> "There is no requirement for the precise computation and assessment of the tax before there can be a criminal prosecution for fraudulent tax evasion under Section 145(b)."

The Court below is just confused and has stated the law backwards.

The penalties provided by Section 145(b) cannot be applied on the "assumption", opinion, guess, and animosity of an agent. (Section 145(b)).

Those penalties can be applied only after the determination of the correct amount of the tax as provided by statute. (Sections 57, 271 and 272).

They can not be applied on guesses made by agents who have not examined, audited or inquired about the returns.

The Court below erred in deciding that:

> "There is no requirement for the precise computation and assessment of the tax before there can be a criminal prosecution for fraudulent evasion under Section 145(b)."

Petitioner submits that when Respondent testified that he had not examined, audited, inquired about, tabulated, calculated, listed or attempted to analyze the items on which any tax would have to be *computed;* and had not determined the correct tax or that there was any "deficiency" as defined by Section 271 of the Code; then there was no proof of fraudulent tax evasion and no one could say that any tax had been evaded.

The Court below notes that Petitioner argues that the Commissioner had not examined and passed

upon the 30,000 claimed deductions; a necessary requirement to determine whether the claimed deductions did result in any taxable income. Then the Court ignored the fact that such failure to pass upon the items proved that the Commissioner could not know that any understatement of taxable income in defendant's returns had occurred. Proof that the Court below erred when it said:

> "At the trial the Government did prove that, by making various false claims for deductions, a substantial understatement of taxable income had occurred." (Error in decision of October 13, 1958). (See Appendix A, infra).

When the Court below has made the above error then its conclusion:

> "This is sufficient basis for a criminal prosecution without first establishing the precise amount of defendant's tax indebtedness." (Decision of October 13, 1958, Appendix A, infra, is just another conclusion and error).

VIII.

The Court below erred in its decision when it said:

> BY THE COURT: "There is no requirement for the precise computation and assessment of the tax before there can be a criminal prosecution for fraudulent tax evasion".

Petitioner submits that when Respondent testified that he had not examined, audited, inquired about, tabulated, calculated, listed or made any attempt to analyze the items on which any tax would have to be "COMPUTED"; and had not determined the correct tax, or any "deficiency" as defined by Section 271 of

the Code; then there was no proof of fraudulent tax evasion. That when he testified that none of those things had been done he could not say that the items were fraudulent and that any tax had been evaded. And these same comments apply to the following statements by the Court below:

> BY THE COURT: "The appellant also argues that the Commissioner had not, prior to the prosecution passed upon each of 30,000 claimed deductions. At the trial the Government did prove that, by making various false claims for deductions, a substantial understatement of taxable income in defendant's returns had occurred." (Decision of October 13, 1958).

Petitioner directs the attention of this Court to the complaint about the Commissioner not examining and passing upon each of the 200 items he charged as fraudulent in this prosecution. Without passing upon, examining, inquiring, auditing, calculating, listing or attempting to analyze the items how did the Commissioner prove to the Court that there had been "false claims" or that any "substantial understatement of taxable income in defendant's returns had occurred"?

And Petitioner asks this Court to consider the testimony of Respondent's agents that they made no examination as required by Section 57, determined no correct tax (Sec. 57), made no inquiry about the particular items (44), made no inquiry about the specific checks (382), made no tabulation of the items listed on the returns (24), made no calculation of the items (25), made no calculation of the depreciation on depreciable property (172 and 416), made no list of the items (Record on Appeal, page 84, Ex. page 61a), made no attempt to analyze any of the items (Record

on Appeal, page 84. Ex., page 56a). That testimony shows the error in the decision of the Court below, in which the Court said:

> "This is sufficient basis for a criminal prosecution without first establishing the precise amount of defendant's tax indebtedness." (Decision of October 13, 1958).
>
> "The sentence imposed here is not illegal in the sense that it is in excess of the punishment authorized by Section 145(b) of the Internal Revenue Code of 1939." (Decision of October 13, 1958).
>
> (That is no proper decision when Section 145(b) is not applicable under the expressed terms of Section 145(b) and under the facts presented by Respondent).
>
> "As we have shown, there is no merit in the contention that the Court was without jurisdiction to try the offense; nor is there any suggestion that the trial was, for any other reason, illegal, or that the defendant's constitutional rights were violated". (Appendix A, infra).

The record shows that the charge was based on an admitted lack of facts resulting from no inquiry about the items listed on the return (44), failure to comply with the requirements of Section 57 which requires the Commissioner to examine the return and determine the correct amount of the tax, no audit (Decision of Court below), no tabulation of the items (24), no inquiry about the specific checks (382), no list of the items (Record on Appeal, page 84; Ex., page 61a), no attempt to analyze the questioned items (Record on Appeal, page 84; Ex., page 56a), no determination of a deficiency (Section 271 and no notice or opportunity to appeal to the Tax Court Section 272).

Petitioner contends that this whole proceeding was illegal from the time the Commissioner failed to examine the returns that had been filed and failed to determine the correct amount of the tax (Section 57), and then failed to compute the tax as required by Sections 271 and 272 of the Code.

The applicable Internal Revenue Laws clearly set out the kind of returns to be filed, Sections 41, 51, 54 of the Code. (Appendix C) Sections 57, 271 and 272 then clearly set out exactly how the correct tax is to be determined. The lower courts completely ignored the law and instead of determing a deficiency if one was found to exist they failed to examine the returns to ascertain the facts. They assessed no deficiency and charged fraud without making any attempt to comply with the requirements of the Code.

> THE COURT BELOW SAID: "There is no requirement for the precise computation and assessment of the tax before there can be a criminal prosecution under Sec. 145 (b)."
>
> "The Commissioner had not, prior to the prosecution passed upon each of the 30,000 claimed deductions."
>
> "This is sufficient basis for a criminal prosecution without first establishing the precise amount of defendant's tax indebtedness."

Reference to the applicable Internal Revenue Laws (Appendix C, infra) shows that is no fair, just, or reasonable, interpretation of the law.

Sections 57, 271, 272 specifically provide for a situation such as this. They provide for the examination of the returns and the determination of the correct tax. They do not provide for a criminal

prosecution on the "assumptions" of an agent made without any examination or determination of the tax.

REASONS FOR GRANTING THE WRIT

Petitioner contends that for the reasons, and on the facts quoted above, this criminal proceeding was unjust and unfair from the filing of the reckless, unvestigated, "assumed" charges for the indictment, to the decision of the Court below. The sentence was illegal and should be voided by this Court.

This Court has full power and authority to correct this injustice and it is the duty of this Court to correct the erroneous interpretation of the Court below.

ARGUMENT

This is a very important case. The Court below has decided that a taxpayer can be fined and imprisoned for income tax evasion before the Commissioner has made any examination, audit, or inquiry about the return which was filed, or made any examination to determine the correct amount of the tax, or if there was any deficiency in tax.

> THE COURT BELOW SAID: "There is no requirement for the precise computation and assessment of the tax before there can be a criminal prosecution for fraudulent tax evasion under Sec. 145(b)."

When there has been no examination, tabulation, inquiry, audit, computation or assessment of the tax; and no determination of the correct tax; there has been no investigation on which to base a fraud charge. A precise computation is necessary. Guesses will not suffice. The fraud charge in this case is nothing but the pique and "assumption" of an agent made as he testified,

without any investigation of the returns, and in total disregard of the requirements of the Internal Revenue Code, Sections 57, 271, 272. (Appendix C, *infra*).

In this case the Courts below have so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. The undisputed testimony of the Respondent in the record proves this.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT E. FUNKHOUSER, *Petitioner*,
5315 Colorado Avenue, N.W.,
Washington 11, D. C.

December 1, 1958.

APPENDIX A
Opinion of the Court Below

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7698

ROBERT E. FUNKHOUSER, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND, AT BALTIMORE

(Argued October 6, 1958. Decided October 13, 1958)

Before SOBELOFF, Chief Judge, HAYNSWORTH, Circuit Judge, and HARRY E. WATKINS, District Judge.

Robert E. Funkhouser, Pro Se, and Leon H. A. Pierson, United States Attorney, for Appellee.

PER CURIAM:

Upon his conviction on June 20, 1952, for income tax evasion, the appellant was sentenced to imprisonment for one year and a fine of $25,000.00. He served the term and paid the fine. On March 28, 1958, nearly six years after his trial, he filed a motion under Rule 35 of the Federal Rules of Criminal Procedure to "correct an illegal sentence."

Relief was not sought under Section 2255 of Title 28, U.S.C.A. Denial of the motion resulted in this appeal.

The appellant expresses dissatisfaction with the lawyers who represented him at the 1952 trial, because they failed to interpose certain defenses suggested by him. These lawyers, not court appointed but selected and paid by the defendant, are men of standing and ability. One defense which they failed to make is expressed by the appellant in forty-five separate "grounds," but there are essentially an assertion that the District Court of Maryland, where the indictment and trial took place, had no jurisdiction. The appellant claimed that venue was in the United States District Court for the District of Columbia, where he resided and conducted his business. Under the law, as it then was, the appellant was subject to indictment and trial for income tax evasion in the District Court for Maryland, because he resided in the taxing district of Maryland, which includes the District of Columbia, and filed his return in the office of the District Commissioner of Internal Revenue at Baltimore. See *Boyles* v. *United States*, 73 F.2d 772 (4 cir., 1934).[1]

The appellant's main contention, which was not argued by his counsel, was that he could not lawfully be prosecuted for income tax evasion because, he alleges, before indictment his return was not audited to determine the exact amount of tax due by him. His reasoning is that in these circumstances no tax was "imposed" within the meaning of Sec. 145(b) of the Internal Revenue Code of 1939, with the evasion of which he could be charged. Evidently the appellant confuses the imposition of the tax with its assessment. The statute itself "imposes" the tax; and while there can be no *civil* action to enforce collection before the

[1] Congress has recently revised this procedure. By 72 Stat. 512, approved August 6, 1958, a defendant can make a motion to be tried in the judicial district in which he was residing when the alleged offense of tax evasion was committed.

assessment procedures provided for in Sec. 272(a) of the Internal Revenue Code of 1939 have been followed, there is no requirement for the precise computation and assessment of the tax before there can be a criminal prosecution for fraudulent tax evasion under Sec. 145(b).

The appellant also argues that the Commissioner had not, prior to the prosecution, passed upon each of 30,000 claimed deductions. At the trial the Government did prove that, by making various false claims for deductions, a substantial understatement of taxable income in the defendant's returns had occurred. This is sufficient basis for a criminal prosecution without first establishing the precise amount of the defendant's tax indebtedness. In later civil proceedings for the collection of the tax due by the appellant there was a determination and assessment as provided for in Sec. 272(a) of the Internal Revenue Code of 1939.

After conviction, the appellant dismissed his lawyers and employed new counsel; but by then the time for appeal had expired. This lawyer then filed a motion in appellant's behalf to enlarge the time for appeal and, after hearing, this motion was properly denied under Rule 45(b), Federal Rules of Criminal Procedure.

The present motion is not available to redetermine issues tried in the District Court in 1952. It cannot be used as a substitute for an appeal, nor are special circumstances shown here, as were shown in *U. S.* v. *Morgan*, 346 U. S. 502 (1954), where the Court entertained a motion for a writ of error *coram nobis* after the defendant had served his sentence. In any event, Rule 35 is a remedy only to correct an illegal sentence; and the sentence imposed here is not illegal in the sense that it is in excess of the punishment authorized by Sec. 145(b) of the Internal Revenue Code of 1939. As we have shown, there is no merit in the contention that the Court was without jurisdiction to try the offense; nor is there any suggestion that the trial was

for any other reason, illegal, or that the defendant's constitutional rights were violated as in the Morgan case.

We think, therefore, that Judge Chesnut, who presided at the original trial and to whom the defendant directed the motion to correct the sentence, properly overruled the motion, and his action is

Affirmed.

APPENDIX B

Order Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7698

ROBERT E. FUNKHOUSER, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

ORDER

The Motion for Rehearing, designated "Petition to Reconsider the Decision of October 13, 1958," and the subsequent motions dated October 25 and October 28, 1958, having been considered by the Court, and the Court being of the opinion that they present no new matter or other ground for rehearing, the same are hereby overruled.

SIMON E. SOBELOFF
United States Circuit Judge

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge

HARRY E. WATKINS
United States District Judge

Filed November 3, 1958
R. M. F. Williams, Jr., Clerk
A TRUE COPY

APPENDIX C

Internal Revenue Code of 1939 Applicable to This Case

SECTION 41. ACCOUNTING PERIODS AND METHODS OF ACCOUNTING.

"The net income shall be computed upon the basis of the taxpayer's annual accounting period in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income."

SECTION 29.41-3. METHODS OF ACCOUNTING. It is recognized that no uniform method of accounting can be prescribed for all taxpayers, and the law contemplates that each taxpayer shall adopt such forms and systems of accounting as are in his judgment best suited to his purpose. Each taxpayer is required by law to make a return of his true income. He must, therefore, maintain such accounting records as will enable him to do so.

SECTION 29.51-5. USE OF PRESCRIBED FORMS. Each taxpayer should carefully prepare his return so as fully and clearly set forth the data therein called for.

SECTION 29.54-1. RECORDS AND INCOME TAX FORMS. Every person subject to the tax, shall for the purpose of enabling

the Commissioner to determine the correct amount of the income subject to the tax, keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of the gross income and the deductions, credits, and other matters required to be shown in any return under Chapter 1.

SECTION 57. EXAMINATION OF RETURN AND DETERMINATION OF TAX.

As soon as practicable after the return is filed the Commissioner shall examine it and shall determine the correct amount of the tax.

SECTION 271. DEFINITION OF DEFICIENCY.

As used in this chapter in respect of a tax imposed by this chapter "deficiency" means—

(a) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return.

(b) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed.

SECTION 271-1. DEFICIENCY DEFINED. Section 271 by its definition of the word "deficiency" provides a term which will apply to any amount of tax determined to be due in respect of a taxable year in excess of the amount of tax reported by the taxpayer for such year; or in excess of the amount reported by the taxpayer as adjusted by way of prior assessments, abatements, credits, refunds, or collections without assessment.

When a case is considered for the first time, the deficiency is the excess of the amount determined to be the correct amount of the tax over the amount shown as the

tax by the taxpayer on his return, or, if it is a case where no tax was reported by the taxpayer, the deficiency is the amount determined to be the correct amount of the tax. Subsequent information sometimes discloses that the amount previously determined to be the correct amount of the tax is less than the correct amount, and that a redetermination of the tax is necessary. In such a case the deficiency on redetermination is the excess of the amount determined to be the correct amount of the tax over the sum of the amount of tax reported by the taxpayer and the deficiency assessed in connection with the previous determination. If it is a case where no tax was reported by the taxpayer, the deficiency is the excess of the amount determined to be the correct amount of tax over the amount of the deficiency disclosed by the previous determination.

SECTION 272. PETITION TO BOARD OF TAX APPEALS. "If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed the taxpayer may file a petition with the Board of Tax Appeals (known as the Tax Court of the United States) for a redetermination of the deficiency. No assessment of a deficiency in respect to the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final."

SECTION 145(b). FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO DEFEAT OR EVADE TAX. "Any person required under this chapter to collect, account for, and pay over

any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties imposed by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000. or imprisoned for not more than five years, or both, together with the costs of prosecution.

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Office-Supreme Court, U.S.
FILED
JAN 2 1959
JAMES R. BROWNING, Clerk

No. 550

In the Supreme Court of the United States

OCTOBER TERM, 1958

ROBERT E. FUNKHOUSER, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
JOSEPH F. GORTIKEN,
JACK M. COTTON,
Attorneys,
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

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No. 550

ROBERT E. FUNKHOUSER, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court's opinion (R. 1a–4a) [1] is not reported. The opinion of the Court of Appeals (Pet. 1a 4a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1958. Motions for rehearing were denied on November 3, 1958. (Pet. 4a–5a.) The petition for a writ of certiorari was filed on December 1, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

[1] Record references are to the Appendix to the petitioner's brief in the United States Court of Appeals for the Fourth Circuit.

QUESTION PRESENTED

Whether a motion to correct sentence, filed almost five years after the sentence had been served, was properly denied where it appeared that the judgment of conviction authorized the sentence imposed and that the motion merely sought to challenge the sufficiency of the evidence to convict.[2]

STATUTE AND RULE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C., Sec. 145 (b)).

Federal Rules of Criminal Procedure:

RULE 35. Correction or Reduction of Sentence

The court may correct an illegal sentence at any time. The court may reduce a sentence

---

[2] An additional contention with respect to venue was advanced below but has been abandoned here.

within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

STATEMENT

Petitioner was indicted on January 17, 1950, and charged in separate counts with five willful attempts to evade federal income taxes for the years 1943 through 1947. After a trial which lasted from May 20, 1952, until June 5, 1952, the jury returned a verdict of guilty on each count. No motion for a new trial or request for postponement of sentence having been made, petitioner was sentenced on June 6, 1952. A fine of $5,000 on each of the five counts of the indictment and a sentence of one year's imprisonment were imposed. (R. 1a–2a.)

The evidence showed understatements of net taxable income resulting from numerous deductions (totalling about $90,000) which the Government contended were willfully and fraudulently taken. Taxpayer testified at great length concerning them. The jury was instructed that, although many of the claimed items were not properly deductible as a matter of law, the important consideration was whether they had been claimed in good faith or bad faith, and, if the jury found that they were deducted mistakenly or accidentally, they should acquit. The jury was also instructed that they should not find a verdict of guilty unless they found the alleged attempt to evade taxes was willful beyond a reasonable doubt, and the mean-

ing of "wilful" in the context was explained. (R. 3a)

A motion to extend time for appeal, tardily filed on June 20, 1952, and a separate motion to reduce sentence were denied on September 10, 1952. On the same day there was filed with the clerk a written notice signed by petitioner and dated June 6, 1952, waiving appeal and electing to begin service of the sentence. (R. 2a.)

Petitioner served the one year sentence of imprisonment and has paid the fine. (R. 2a.)

On March 28, 1958, petitioner filed the instant motion which stated that it was filed under Rule 35 of the Federal Rules of Criminal Procedure. The District Court (Judge Chesnut, who had presided at the trial), after consideration of petitioner's written and oral arguments, denied the motion on June 2, 1958. His opinion pointed out that the sentence was much less than the punishment authorized by Section 145 (b) of the Internal Revenue Code of 1939; that no fact was alleged in the motion to show that the court was without jurisdiction; and that the motion was not based on any newly discovered evidence or any other ground which would tend to show petitioner did not have a fair trial. (R. 1a–4a.)

Noting that the instant motion could not be used as a substitute for an appeal, the Court of Appeals affirmed.

ARGUMENT

Petitioner has here abandoned his argument, advanced below, that as a resident of the District of Columbia he was not subject to indictment and trial for income tax evasion in the United States District

Court for the District of Maryland. He now merely contends (Pet. 5–23) that his motion to correct the sentence he had already served should have been granted because, prior to a precise computation and assessment of his civil tax liability, his criminal conviction was necessarily invalid. This contention misconceives the scope of a motion to correct sentence under Rule 35 of the Federal Rules of Criminal Procedure, *supra*, pp. 2–3, and is, in any event, without substance.

Sentences subject to correction under Rule 35 are those which the judgment of conviction did not authorize. *United States* v. *Morgan*, 346 U. S. 502, 506; *Cook* v. *United States*, 171 F. 2d 567, 570 (C. A. 1st), certiorari denied, 336 U. S. 926; *Fooshee* v. *United States*, 203 F. 2d 247 (C. A. 5th). The motion does not, and cannot, assert that the sentence here imposed was not within the maximum (imprisonment for 5 years and fine of $10,000) authorized for each violation of Section 145 (b) of the Internal Revenue Code of 1939, *supra*, p. 2. *Rose* v. *United States*, 128 F. 2d 622, 626–627 (C. A. 10th), certiorari denied, 317 U. S. 651. The motion does not allege any violation of procedural due process, and it cannot be maintained that the District Court did not have jurisdiction of both petitioner and the subject matter. *Bowles* v. *United States*, 73 F. 2d 772, 773–774 (C. A. 4th), certiorari denied, 294 U. S. 710.

In contending that a precise computation and assessment of his civil tax liability were conditions precedent to any criminal prosecution for willful attempted tax evasion, the petitioner is, in effect, chal-

lenging the sufficiency of the evidence to convict. As the Court of Appeals noted, however, even if the motion were available as a substitute for an appeal, there is no merit in the contention. *Ford* v. *United States,* 233 F. 2d 56, 58–59 (C. A. 5th), certiorari denied, 352 U. S. 833; *Comerford* v. *United States,* 64 F. 2d 28, 30 (C. A. 2d), certiorari denied, 289 U. S. 759.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
JOSEPH F. GOETTEN,
JACK M. COTTON,
Attorneys.

DECEMBER 1958.

U. S. GOVERNMENT PRINTING OFFICE: 1958

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 550

ROBERT E. FUNKHOUSER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

ROBERT E. FUNKHOUSER,
Petitioner,
5345 Colorado Ave., N. W.,
Washington 11, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 550

ROBERT E. FUNKHOUSER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Respondent's brief in opposition sets out errors in the law, the evidence, and the cases cited.

REPLY TO PAGE TWO OF RESPONDENT'S BRIEF IN OPPOSITION

Respondent quotes Sec. 145(b) of the Internal Revenue Code of 1939 as the law under which this case was prosecuted. That law is not applicable to this case because the section quoted *twice repeats* that the penalties are provided for the *evasion of any tax imposed by this chapter.* No tax had been *imposed.* There had been no examination of the returns, no determination of the correct tax. No determination of

any deficiency in tax. No assessment of any tax. No inquiry about the returns or the items listed in the returns, no notice of any proposed deficiency. No opportunity for the Tax Court of the United States to review or redetermine, or determine if there was any deficiency. No tax was determined, assessed or *imposed*.

The Internal Revenue Code of 1939 sets out in Sections 41, 51, 54, 57, 271, 272 exactly how all taxes are to be imposed by the chapter. (Pet. 5a-8a).[1]

Respondent testified that he found all gross income and all expenses listed in the income tax returns which were filed by petitioner (Pet. 7-8). The returns complied with Sections 41, 51, 54 of the chapter (Pet. 5a-6a).

These returns were not examined by the Commissioner. No tax was imposed (Sec. 57, 271, 272).

Section 57 of the Internal Revenue Code of 1939 provides:

> Sec. 57. As soon as practicable after the return is filed the Commissioner shall examine it and shall determine the correct amount of the tax (Pet. 6a).

Respondent admits, the record shows, and the Courts below admit that there was no examination of the returns: no determination of the correct tax, no deter-

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[1] Reference (Pet.) refers to petition for writ of Certiorari this Court.
Reference (Opposition) refers to respondent's brief in opposition.
Reference (Appl. Br.) refers to petitioner's brief in Appellate Court.
Reference (Trans.) refers to transcript of proceedings in District Court.

mination of any deficiency, no audit, no precise computation, no assessment, no passing upon the claimed deductions (Pet. 2a-3a); no inquiry about the returns, no inquiry about the particular items listed as expenses, no inquiry about the specific checks listed as expenses, no tabulation of the items listed as expenses, no computation of the allowable depreciation, no list of the items, no attempt to analyze the items (Pet. 6-7); and no determination, calculation or imposition of any tax (Sec. 57, 271, 272).

These are the only provisions of the Internal Revenue Code of 1939 for the examination, determination of the correct tax, determination of any deficiency in tax and the *imposition* of any tax.

When no tax was imposed under the provisions of those sections of the Internal Revenue Code no tax was *imposed*, and the provisions of Sec. 145(b) were not applicable.

The Courts below found there was no examination or imposition of any tax and they erred in ruling that the penalties of Sec. 145(b) could be imposed for this prosecution without any examination, assessment or the imposition of any tax.

The Court below said:

a. "Before indictment his return was not audited to determine the exact amount of tax due by him" (Pet. 2a).

b. "There is no requirement for the precise computation and assessment of the tax before there can be a criminal prosecution for fraudulent tax evasion under Sec. 145(b)." (Pet. 3a).

c. "The Commissioner had not, prior to the prosecution passed upon each of 30,000 claimed deductions." (Pet. 3a).

d. The Commissioner made no inqury about the particular items and the specific checks listed in the returns, made no tabulation of the items, made no calculation of the items, made no computation of the items, made no list of the items, made no attempt to analyze the items. (Pet. 7).

The Commissioner made no determination of any deficiency in tax (Sec. 271).

The Commissioner made no assessment or *imposed* no tax under Sec. 272.

The agent testified that he made the charges on the basis:

> "We take the total sum and apply in what in our judgment is a reasonable figure to apply". (Record on Appeal, page 84. Ex. page 56a).

The record shows that the agent just set up some "assumed" figures for the indictment which he admitted at the trial were just *assumed*, and *wrong for three of the five years* (Transcript pages 493-497).

REPLY TO PAGE 3 OF RESPONDENT'S BRIEF IN OPPOSITION WHICH MISQUOTES THE EVIDENCE.

The Record shows by Government testimony:

1. The only examination made by the Government consisted of securing the automobile license number of petitioner's automobile and following that automobile about the roads for a couple of weeks, and then enventorying petitioner's safety deposit box in search of cash (Pet. 6).
2. Respondent testified that thereafter he made no inquiry about the particular items listed as expenses on the returns (Pet. 7).

3. Respondent testified that he made no inquiry about the specific checks listed as expenses (Pet. 7).

4. Respondent testified that he made no tabulation of the items listed as expenses (Pet. 7).

5. Respondent testified that he made no calculation of the items listed as expenses (Pet. 7).

6. Respondent testified that he made no computation of the allowable depreciation (Pet. 7).

7. Respondent testified that he made no list of the items listed as expenses on the returns (Pet. 7).

8. Respondent testified that he made no attempt to analyze the 30,000 listed items of expense (Pet. 7).

9. Respondent testified that he found the expenses listed and itemized and recorded in minute detail (Pet. 8).

10. Respondent made no determination of any tax on which any deficiency, as defined by Sec. 271, could be determined (Pet. 10).

11. Respondent mailed no 90-day letter as required by Sec. 272.

12. Respondent afforded no opportunity for any review by any other official, or any appeal to any other official, or to the Tax Court of the United States (Sec. 272).

13. Respondent ignored Secs. 57, 271, 272, and the Courts below ruled that there was no requirement for determination of the precise tax before this criminal proceeding (Pet. 2a-3a).

14. Respondent and the Courts below proceeded with this prosecution on their theory that no examination or inquiry was necessary and that any assumptions of any agent would suffice for this criminal prosecution, fine and imprisonment (Pet. 2a-3a).

15. Respondent set up the "assumed" figures for the indictment in this case before he made any examination, audit, inquiry, tabulation, calculation, computation, list, or any attempt to analyze the items listed as expenses on the returns (Pet. 7). The indictment figures were only the first of a series of thirteen different "assumed" figures set up by respondent; none or which were based on any examination or determination of a deficiency as defined by Sec. 271 or imposed by Sec. 272. (See Record on Appeal, page 159).

16. Respondent ignored the Statutory requirements of Sections 57, 271, 272 for the legal determination, assessment and imposition of any taxes and his agent testified that he made these charges on a basis discarded over a thousand years ago. He testified:

> "We take the total sum and apply in what in our judgment is a reasonable figure to apply". (See agent's testimony, Record on Appeal, page 84. Ex. page 56a).

17. Respondent testified that for the figures for these taxes he just threw in whole columns of figures without making any inquiry, audit, examination or any attempt to analyze the items, and without knowing why the columns of figures were in there at all. (See Record on Appeal, page 84. Ex. page 56a).

18.—Respondent permitted his agent to prosecute this case with perjury from page 5 of the transcript to page 498 of the transcript.

1. Perjury on page 5 that the laundry had been sold in 1944 which was proved perjury by the testimony of the same agent on page 498.

2. Perjury on page 104 about the contentions as to the use of property which was proved perjury by the testimony of the same agent on pages 393-397.

3. Perjury on page 498 when the agent testified that medical expenses were not permitted by law in 1943. Proved perjury by reference to the Code of 1939.

19. The Court erred in accepting assumptions and perjury in place of evidence of the required examination of the returns and the determination of the correct tax; the determination of a deficiency and the imposition of any tax as required by Sec. 57, 271, 272, 145(b) (Pet. 14).

20. The Court erred in refusing to allow petitioner to present proof, facts and testimony by an expert accountant who had examined the books and records and who had found that no tax was due, owing and evaded (Pet. 14).

21. The Court erred in ruling that the "assumptions", opinions and charges of an agent which the agent admitted were made without any examination, tabulation, calculation, computation or determination of any deficiency could be used as a substitute for the "precise computation", determination and imposition of the tax in this criminal prosecution (Pet. 6, 7, 2a, 3a).

22. The Court below erred in ruling that respondent could prove fraud without his having made any examination, audit, precise computation, inquiry, tabulation, list, attempt to analyze or pass upon the claimed deductions (Pet. 2a, 3a, 14).

23. The Court below erred when it proceeded with this prosecution after it found that 29,800 of the listed items of expense were legally allowable and that only 200 of the items were questioned and the Court found:

> BY THE COURT: "As to many of the items that he has deducted, they were deductible legally, properly if the facts which the defendant relates to you are accepted by you as true." (Pet. 12-22).

24. The Court below erred when it ruled that there was no requirement for the precise computation and assessment of the tax before there can be a criminal prosecution for fraudulent tax evasion under Sec. 145(b) when respondent admitted that all gross income and all expenses were found reported (Pet. 7-8), and 29,800 of the 30,000 listed items were found to be allowable and the other 200 items were not inquired about, tabulated, calculated, listed, computed, analyzed, audited or examined (Pet. 7, 8, 9, 10, 11-23).

25. The Court below erred when it allowed this criminal prosecution to proceed after it found that respondent had allowed 99 34 100% of the listed expenses and was here making these charges of fraud without having made any examination of the returns, without having made any inquiry about the items, without having made any tabulation of the items, without having made

any calculation of the items, without having made any computation of the large depreciation item, without having made any attempt to analyze the items, without having made any determination of any deficiency, without having made any determination of the correct amount of the tax or without having complied with any of the statutory requirements for the determination assessment and imposition of the correct tax. (Pet. 2-22 and Sec. 57, 271, 272).

Any one of those twenty-five items all put into this record by respondent's testimony, shows that this was not a just or proper criminal prosecution. This sentence was based on "assumptions" which had no basis in fact, investigation, examination, or application of the Internal Revenue Laws. (Sec. 57, 271, 272).

The methods described by respondent in his testimony were descarded over a thousand years ago as legal methods of imposing taxes. (Pet. 2-22 and 2a-4a).

The Internal Revenue Code of 1939 sets out very definitely the requirements for the precise determination of the correct tax, and exactly how the tax is to be determined and imposed. (Sec. 57, 271, 272). No tax was determined or imposed here.

The penalties of Sec. 145(b) cannot be legally applied until the tax has been *imposed* in accordance with the chapter (Sec. 57, 271, 272). A precise computation is required. Any "assumption", conjecture, guess or charge by any agent, court or jury unjustly deprived petitioner of his constitutional rights.

The ruling of the Court below that the Government did prove false claims for deductions when the Government admitted not having made any audit to determine the *exact amount* of any tax due; without the *precise computation* and assessment of the tax; without *passing upon each of the claimed deductions*, deprived this petitioner of his constitutional rights, his property, and his liberty. (Pet. 2a-3a).

Without having made any examination, determined the correct amount of the tax, or made any inquiry, tabulation, audit, calculation, list, computed the depreciation allowable, made any attempt to analyze the items, determined any deficiency and *imposed* any tax, respondent had no facts on which to prosecute any fraud charge in any court. (Pet. 2-22 and 2a-8a).

REPLY TO PAGE 4 OF RESPONDENT'S BRIEF IN OPPOSITION WHICH DOES NOT STATE ALL OF THE FACTS ABOUT PETITIONER'S EFFORT TO APPEAL THIS CASE.

The record shows that the District Court admitted receiving petitioner's notice of appeal within a few hours after sentence was pronounced (Appeals Br. 18-23).

REPLY TO PAGE 4 OF RESPONDENT'S BRIEF IN OPPOSITION WHICH ERRS IN TRYING TO JUSTIFY THE SENTENCE BY SAYING THAT THE SENTENCE WAS MUCH LESS THAN THE PUNISHMENT AUTHORIZED BY AN INAPPLICABLE LAW. Sec. 145(b).

Respondent cannot justify the sentence by stating that the sentence was much less than the punishment authorized by Sec. 145(b) for the evasion of taxes *imposed* by the chapter. No taxes were *imposed* by the chapter in this case. The returns were not examined, the correct amount of the tax was not determined, there was no determination of any deficiency,

no taxes were *imposed*. Sec. 145(b) provides penalties only for evasion of taxes *imposed by the chapter*. The chapter provides exactly how taxes shall be *imposed* and it does not provide for any "assumptions" by anybody. The method of imposing taxes is explicit, definite and mandatory. The record shows that no taxes were imposed in this case. Section 145(b) was not applicable and the fact "that the sentence was much less than the punishment authorized by Section 145(b)" is irrelevant.

REPLY TO PAGE 4 OF RESPONDENT'S BRIEF IN OPPOSITION WHICH STATES THAT PETITIONER HAS ABANDONED THE ARGUMENT ABOUT THE JURISDICTION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

Respondent repeatedly states in his brief in opposition that petitioner has abandoned his argument that as a resident of the District of Columbia petitioner was not subject to indictment and trial in the District Court for the District of Maryland.

This question was important in this case because of the ruling of the Court below in *Bowles* v. *United States*, 72 F. 2d 772, that a resident of the District of Columbia could be prosecuted in a Maryland court on a charge of violation of Section 145(b) of the Internal Revenue Code of 1939.

However, prior to the filing of this appeal petitioner had presented the facts in this case to the Practicing Law Institute, the Treasury Department, and to the Joint Committee on Internal Revenue Taxation to the Committee on Ways and Means and they had presented the facts to the Congress with a recommendation for prompt correction of the error and injustice. The Congress, realizing the injustice of the ruling of the

Court below promptly passed 72 Stat. 512 to correct the error of the Court below; and on August 6, 1958, after petitioner's brief (Appel. Br. 1-34) had been prepared, President Eisenhower approved and signed 72 Stat. 512 correcting the unjust ruling which had been applied by the Court below.

Petitioner, having completely won the point by the action of the Congress, and being thus assured that no other American taxpayer will ever again be subjected to similar embarrassment and injustice (Appel. Br. 13-23) did not include that question in the petition to this Court.

However, respondent has apparently failed to understand the significance of the question, the injustice of that ruling by the Court below, the disastrous effect in this case, and petitioner's reason for abandoning it here. Now, since respondent has repeatedly brought this question to the attention of the Court; petitioner asks the Court to remember that the question was abandoned here because the Congress has already decided that petitioner was entitled to the relief petitioner was asking for and the only question remaining for this Court to consider is the disadvantage and injustice the lower Court's ruling wrought in the Baltimore trial (Appel. Br. 13-34).

The action of the Congress (72 Stat. 512) leaves the main question before this Court. Can the penalties of Sec. 145(b) be applied when all gross income and all expenses have been reported in the returns filed and there has been no examination of the returns to determine the correct amount of the tax (Sec. 57), no determination of any deficiency (Sec. 271), and no assessment, or imposition of any tax as required

by Section 272 of the Code. Can the penalties of Sec. 145(b) be applied on the simple assumptions and charges of an agent who testified that he had made no inquiry about the returns (Pet. 6), no inquiry about the particular items listed as expenses on the returns (Pet. 7), no tabulation of the items expensed (Pet. 7), made no calculation of the items (Pet. 7), and made no computation of the items to determine if there was any basis for any assumptions or charges or for determining that a deficiency in tax did exist (Pet. 7-22).

REPLY TO PAGE 5 OF RESPONDENT'S BRIEF IN OPPOSITION WHICH CITES FIVE CASES; ALL OF WHICH ARE INAPPLICABLE IN THIS CASE.

United States v. *Morgan*, 346 U.S. 502. Morgan pleaded guilty to the charge and was sentenced. Later he complained to the Court that at the trial he was not properly represented by counsel.

> MR. JUSTICE REED said: The papers are labeled as though they sought a common-law writ of Coram Nobis, but the motion indicated that an order voiding the judgment is sought. In behalf of the unfortunates, Federal Courts should act in doing justice if the record makes plain a right to relief.

This Court granted the relief. It should grant the relief in this case on this record. The cases were similar only in the fact that "the record makes plain a right to relief."

Cook v. *United States*, 171 F. 2d 567. Edgar W. Cook was convicted for breaking and entering a Post Office. He was sentenced on April 4, 1945. On January 20, 1948, the District Court entered an order amending the judgment by adding a new paragraph, adding a fine of $1.00.

The facts in the *Cook* case are not at all applicable here. This sentence was imposed before there was any examination to determine the correct tax, or to determine if any tax was due or owing. There never was any determination of a deficiency in tax and no tax was imposed. There should never have been a prosecution or sentence in this case. The whole proceeding was illegal here.

Fooshee v. *United States*, 203 F. 2d 247. The United States, while insisting that an offense was charged, points out that, for the reasons it states in its brief, Rule 35 is not applicable to defendant because a motion to correct a sentence under Rule 35 *presupposes* a valid sentence and affords a procedure for bringing an improper sentence into conformity with the law.

That case is not at all applicable here. There are no *presuppositions* in Rule 35.

In this case the Court would have to presuppose that some time in the future there might be an examination of the income tax returns which had been filed by this petitioner (Sec. 57); and the Court would have to *presuppose* that at that examination perhaps some of the items listed as expenses on the return might be disallowed, and then the Court would have to *presuppose* that as a result of disallowing some of those listed expense items that a deficiency in tax; as defined by Sec. 271 of the Code, might be determined; and then the Court would have to *presuppose* that some deficiency in tax might be determined, and made final; as provided by Sec. 272 of the Code; and that such deficiency would then be *imposed* and evaded to make the penalties of Sec. 145(b) applicable, and thus make this sentence legal. Rule 35 is a simple ten-word

sentence. No *presuppositions* can make this sentence legal.

Bowles v. *United States*, 73 F. 2d 772. Bowles failed to make an income tax return for the year 1930. Bowles was a resident of the District of Columbia and he appealed the prosecution in the District Court of Maryland. The Court of Appeals for the Fourth Circuit ruled that a resident of the District of Columbia could be tried in the Maryland Court.

The decision of the Court below may not have been unjust to Bowles because Bowles had not reported his income for the year 1930. He was guilty of income tax evasion and was properly convicted. But the ruling of the Court below caused great injustice in this case (Appellate Br. 13-23). Here no tax was evaded. Returns were filed reporting all income and all expenses (Pet. 7-8). This injustice has been called to the attention of the Congress and the Congress has passed 72 Stat. 512, approved August 6, 1958, correcting the error of the Court below and preventing this error of the Court below from ever again bringing a similar injustice to another taxpayer. (See note Pet. 2a). The injustice has been recognized and corrected by the Congress. Please consider these facts and correct the injustice of the error in this case.

The Courts below erred in ruling:

1. No tabulation of the expense items was at all necessary (Pet. 7).
2. No audit of the returns was necessary (Pet. 2a).
3. No precise computation of the tax was necessary (Pet. 3a).

4. It was not necessary to pass upon the claimed deductions before prosecution (Pet. 3a).

5. Jurisdiction in the Maryland Court by the Court below which has since been corrected by Congress (Pet. 2a note).

6. It was not necessary to examine the returns to determine the correct amount of the tax or impose the tax as required by Sec. 145(b).

7. That the testimony of an expert accountant who had examined the books, records and returns and found that no tax was due or owing could not be presented (Pet. 14).

8. That an appeal not filed by a highly touted lawyer (Appel. Br. 1a, 4a) could not be filed (Appel. Br. 20-21).

9. That when 99 34/100% of the listed items were found to be allowable that there is no requirement for an "audit, precise computation, or passing upon "the other 66/100 of one per cent of the items before there can be a criminal prosecution for fraudulent tax evasion under Sec. 145(b) (Pet. 10-14, 2a-3a).

10. When all gross income and all expenses have been reported (Pet. 8), none of the requirements of Sec. 57, 271, 272 complied with, no taxes computed or imposed, due, owing, payable, no deficiency determined or imposed as required by Sec. 145(b); then the Court erred in imposing this sentence (Pet. 1-23, 1a-8a).

This Court has the power to correct the injustice of this sentence. It has frequently used that power in the past.

Patterson v. *Alabama*, 249 U.S. 600:

> "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review, but to make such disposition of the case as justice requires."

United States v. *Morgan*, 346 U.S. 600:

> "Federal Courts should act in doing justice if the record makes plain a right to relief."

The record before this Court shows that petitioner filed income tax returns in which he reported all gross income (Pet. 7-8), and all expenses (Pet. 8, 2a-3a).

The returns were complete and listed the expenses in minute detail (Pet. 6-8). They listed 30,000 individual items; 29,800 — 99 34/100% of which were allowed without any examination and the other 200 or 66/100 of one per cent of the listed items the agent testified he disallowed without making any examination, inquiry, tabulation, calculation, computation, list, or any attempt to analyze the items (Pet. 6-7).

The District Court ruled that "no tabulation is at all necessary" (Trans. 24-25). The Court below ruled that "there is no requirement for the precise computation and assessment of the tax before there can be a criminal prosecution for fraudulent tax evasion under Sec. 145(b)." And that Court ruled that "no audit" or "passing upon the claimed deductions was necessary" (Pet. 2a-3a).

Both Courts below ruled that no examination or determination of a deficiency was necessary and the District Court ruled that the best, most experienced and capable tax accountant in Baltimore, who had

made a thorough examination of the returns, books and records and had found that no tax was due and owing could not testify to that fact (Pet. 14).

CONCLUSION

The record shows that the sentence was unjust. The petition should be granted.

Respectfully submitted,

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January 12, 1959.